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No. 75-1237

In the Supreme Court of the United States

OCTOBER TERM, 1975

AETNA CASUALTY & SURETY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In 1968 and 1969, the United States Post Office Department[1] entered into ten contracts with the J.C. Corrigan Company for the construction and installation of mail handling facilities at various post offices. Petitioner was the surety on each of the ten contracts. Corrigan defaulted in 1971, and, as a result, petitioner had to pay the materialmen and subcontractors $234,704.36 owed by Corrigan under the contracts. There is an unpaid balance of $77,094.61, which would have been due Corrigan under the contracts, that is being held by the Postal Service as an offset against an unrelated debt owed the government by Corrigan.

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[1]On July 1, 1971, the United States Postal Service succeeded to the interest of the United States Post Office Department pursuant to the Postal Reorganization Act, 84 Stat. 719. All assets and liabilities of the Post Office Department were transferred to the Postal Service. 39 U.S.C. 2002.

Petitioner brought suit in the Court of Claims seeking the unpaid balance on the theory that as a subrogee it is entitled to the money that would have been due Corrigan. The Court of Claims held that under this Court's decision in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, the government had a right to set off the unpaid balance against Corrigan's other debt (Pet. App.).

The Court of Claims correctly determined that this case is controlled by *Munsey Trust*. In that case, a contractor's surety, which had paid subcontractors and materialmen on a government project after the contractor defaulted, sued the United States for the unpaid contract balance. This Court, in language equally applicable here, held that as against a subrogee of the contractor the government had an unqualified right to set off the unpaid balance against a debt incurred by the contractor in an unrelated transaction (332 U.S. at 239-240):

> The government has the same right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." * * * More than that, federal statute gives jurisdiction to the Court of Claims to hear and determine "All set-offs, counterclaims, * * * or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . . ." * * * This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, subject to review by that court. Insofar as the suitor in the Court of Claims asserted the contractor's title to the sum in dispute, that court was under statutory duty to recognize the undisputed claim for damages of the United States.

Petitioner contends that the *Munsey Trust* rule should not apply where the debt being set off arises through the government's own neglect or failure, arguing that the government should have protected itself, through a surety, against the contingency that gave rise to Corrigan's debt in the other transaction.[2] There is no basis for so restricting the government's right of set-off. The manner in which the debt being set off arose, unless perhaps manifestly unlawful, should have no bearing upon the government's right of set-off,[3] and petitioner is unable to cite authority to the contrary. Although petitioner relies upon *Kennedy Electric* (see note 2, *supra*), the issue there was whether a subcontractor has the right to recover against the government for amounts due on a government contract and not paid by either the contractor or a surety. The resolution of that issue, which had been expressly left open in *Munsey Trust* (see 332 U.S. at 242), cannot affect the validity of the broad rule of that case. Indeed, the Court expressly stated in *Munsey Trust* that even if

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[2]Corrigan's debt arose out of a contract between the Post Office Department and Corrigan for the construction and installation of a mail handling system in Milwaukee, Wisconsin. Corrigan failed to file the bonds required under that contract, and upon Corrigan's default the Postal Service was forced to pay the materialmen and subcontractors itself. *Kennedy Electric Co.* v. *United States Postal Service*, 508 F. 2d 954 (C.A. 10). The amount by which those payments exceeded the government's retainages under the contract thereby became a liability owing from Corrigan to the Postal Service.

[3]Moreover, the novel rule petitioner advocates would be uncertain in application and thereby give rise to much litigation over, for example, whether the debt being set off should have been insured against or whether the origin of the debt (such as the liability of a joint tort-feasor) reflects sufficiently adversely upon the government for the courts to bar collection in favor of the debtor's subrogee. The clear common law rule of set-off, confirmed by *Munsey Trust*, presumably was intended in part to avoid just such cumbersome case-by-case weighing of the respective equities possessed by the creditor and the debtor's subrogee.

laborers and materialmen have a right "to the retained percentages if both contractor and surety failed to pay them ***[,] those would be rights to which the surety could not be subrogated, for by hypothesis it would have done nothing to earn subrogation."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.